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Responsibility of international organizations

Comments and observations received from international organizations

Addendum

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I. Introduction

1. At its fifty-fifth session, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003, 2004 and 2005 reports. Most recently, the Commission sought comments on chapter VI of its 2005 report[2] and on the issues of particular interest to it noted in paragraph 26 of the 2005 report.[3]

2. The replies from international organizations to the 2005 request by the Commission received prior to 17 March 2006 were reproduced in document A/CN.4/568.[4] The present addendum contains the written comments received from three additional international organizations as at 12 May 2006 (dates of submission in parentheses): European Commission (3 February 2006), International Labour Organization (ILO) (5 April 2006) and United Nations Educational, Scientific and Cultural Organization (UNESCO) (28 April 2006). These comments are reproduced in section II below, in a topic-by-topic manner. Section III of the present document contains a list of attachments to the comments received from international organizations. Any further submissions received will be reproduced as additional addenda to document A/CN.4/568.

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.

[2] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10).

[3] Paragraph 26 of the 2005 report reads as follows:

> 26. The next report of the Special Rapporteur will address questions relating to (1) circumstances precluding wrongfulness, and (2) responsibility of States for the internationally wrongful acts of international organizations. The Commission would welcome comments and observations relating to these questions, especially on the following points:
>
> (a) Article 16 of the articles on Responsibility of States for Internationally Wrongful Acts only considers the case that a State aids or assists another State in the commission of an internationally wrongful act. Should the Commission include in the draft articles on responsibility of international organizations also a provision concerning aid or assistance given by a State to an international organization in the commission of an internally wrongful act? Should the answer given to the question above also apply to the case of direction and control or coercion exercised by a State over the commission of an act of an international organization that would be wrongful but for the coercion?
>
> (b) Apart from the cases considered under (a), are there cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member?

[4] The written comments received in response to the requests made in 2003 and 2004 received prior to 9 May 2005 are contained in documents A/CN.4/545, A/CN.4/547 and A/CN.4/556.

II. Comments and observations received from international organizations

A. General remarks

European Commission

Our general view on the work of the International Law Commission in 2005 was expressed in the statement of the European Union and of the European Community to the Sixth Committee of the General Assembly on 25 October 2005 (see A/C.6/60/SR.12).

We welcome the progress made by the International Law Commission and we congratulate the Special Rapporteur, Professor Giorgio Gaja, for his third report. The European Community attaches great importance to the work of the International Law Commission, but necessarily looks at it from the perspective of a rather specific international organization. We therefore restrict our remarks to a few aspects of the draft articles.

Articles 8 (1), 9, 10 and 11 of the present draft are identical to articles 12 (1), 13, 14 and 15 on State responsibility. There is indeed no need to deviate from the rules for States in this respect and hence we have no remarks.

Draft articles 12 to 14 on inter-temporal law reflect the precedents of articles 16-18 on State responsibility. They again do not require any comment from our side.

International Labour Organization

This is the first time that ILO is contributing to this exercise. Some remarks will therefore inevitably be devoted to issues dealt with by the International Law Commission prior to its fifty-seventh session, held in 2005. It is hoped that these remarks can still be taken into consideration by the Special Rapporteur and the Commission.

In general, it may be said that there is no significant practice as regards the international responsibility of ILO. There is of course abundant practice concerning the responsibility of the organization vis-à-vis its officials, including a rich case law elaborated by the ILO Administrative Tribunal. We do not, however, consider this practice to be relevant in the context of this exercise as it reflects a specific legal system, as explained below in more detail.

In general terms, ILO considers that the comments made on the relevant parts of the 2003 and 2004 International Law Commission reports by some organizations, namely Interpol and the International Monetary Fund, regarding the differences between the law of State responsibility and the law of responsibility of international organizations, are sensible. In this connection two points seem to us particularly important. The first is the fact that issues implicating the organic principles or internal governance of international organizations are governed by international law, while, as regards States, municipal laws, including the national constitutions, are, from the standpoint of international law and of international tribunals, merely facts which express the will and constitute the activities of States.[5] On the other hand, for

[5] See comments by Interpol in A/CN.4/556, p. 30.

international organizations, unlike what happens for States, international responsibility must be examined in light of the organizations' purposes and functions as specified or implied in their constituent documents and developed in practice, because they are not endowed with general competence.[6]

United Nations Educational, Scientific and Cultural Organization

Firstly, UNESCO would like to point out that it supports the choice of the Commission to rely in principle on the approach taken in the articles concerning the responsibility of States for internationally wrongful acts. However, as will be clarified below, UNESCO is of the opinion that, even in the absence of any relevant practice, the Commission should be careful not to adhere too strictly to those articles, when objective characteristics of international organizations appear to suggest that a different solution should be developed. Some of the articles provisionally adopted are based on elements of practice pertaining, in many cases, to a single type of activity (military actions conducted by peacekeeping forces). However, most of the international organizations do not perform such an activity. The different typology of acts and activities performed by international organizations and the ways in which they may entail the responsibility of an organization should be further investigated.

Concerning your request for information with respect to claims of violations of international law made against UNESCO, it appears that since its establishment no such claim has been made against the organization.

Nonetheless, reference may be made to civil lawsuits in which UNESCO was involved as a respondent that may be of relevance for the present study as they develop arguments (for instance, as regards the issue of attribution of conduct) that could be applicable by analogy to the field of responsibility for internationally wrongful acts.

B. Draft article 1 — Scope of the draft articles

3. Draft article 1, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

> **Article 1**
> **Scope of the present draft articles**
>
> 1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.
>
> 2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.[7]

[6] See comments by IMF in A/CN.4/556, pp. 38 and 39.

[7] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

International Labour Organization

With regard to draft article 1, paragraph 2, it would appear that joint responsibility[8] of a State in connection with the act of an international organization might be more specific to the European Community, as an international organization *sui generis*, rather than for any other international organization. In fact, as indicated in draft article 2, the legal personality of the organization should be the organization's "own" and therefore "distinct from that of its member States".[9]

As regards the limited practice of ILO in this respect, ILO refers to its comments below on the specific questions asked by the International Law Commission concerning the responsibility of a State in the cases of aid or assistance, direction and control or coercion exercised by a State over the commission of an act of an international organization.

C. Draft article 2 — Use of terms

4. Draft article 2, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

> **Article 2**
> **Use of terms**
>
> For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.[10]

United Nations Educational, Scientific and Cultural Organization

Under this provision, the term international organization is defined as referring to "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities".

The reference to organizations established "by another instrument governed by international law" finds confirmation in the UNESCO practice concerning the creation of intergovernmental organizations through a simplified procedure whereby UNESCO governing bodies (the General Conference or the Executive Board) adopt their statutes and those Member States interested in their activities may notify the Director-General of their acceptance of the statutes. This was the case for the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), established in Rome in 1959. At the time of the adoption by the UNESCO General Conference, no doubt was raised concerning the nature of the statutes of ICCROM, which appear to have been implicitly considered as being an

[8] See A/CN.4/541, para. 8 and *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 479.

[9] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 54, commentary to draft article 2, para. (10).

[10] Ibid., para. 53.

international legally binding instrument creating an intergovernmental organization.[11] In an unpublished letter dated 22 May 1959 addressed to Francis Wolf, legal adviser to ILO, Claude Lussier, UNESCO deputy legal adviser, explained that the procedure followed for the establishment of ICCROM was one of the legal tools used within the organization to create bodies that complement and complete the activities of UNESCO. Among these tools, he indicated: (a) a multilateral intergovernmental agreement negotiated under the auspices of UNESCO (as in the case of the European Organization for Nuclear Research); and (b) a national act creating institutions operating under the legal system of a member State. The case of ICCROM is described as being "halfway" between these two solutions. In another legal opinion, the UNESCO legal adviser, Hanna Saba, stated that the Centre had been created by the General Conference and that it derived its international legal personality from the decision of that body.[12] Subsequently, the statutes of ICCROM were registered with the Secretariat of the United Nations, thereby confirming that they were considered as being an implied international agreement.

A more recent case concerns the Synchrotron-light for Experimental Science and Applications in the Middle East (SESAME) centre, which was established in 2002 with the structure of an intergovernmental organization. Its statutes were approved by the UNESCO Executive Board (which is a body having a restricted composition: 58 members elected by the General Conference) on delegated authority by the General Conference and entered into force after the Director-General had received a certain number (six) of instruments of acceptance from Member States from the region concerned.[13]

D. Draft article 3 — General principles

5. Draft article 3, as provisionally adopted by the Commission at its fifty-fifth session, reads as follows:

Article 3
General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

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[11] See resolution 9 C/4.53 of the General Conference, in *Records of the General Conference, Ninth Session, New Delhi, 1956: Resolutions*, pp. 24 and 48, available by searching the UNESCO website at http://unesdoc.unesco.org/ulis.

[12] Memorandum of 12 November 1959 from H. Saba to J. K. van der Haagen, Chief of UNESCO Division of Museums and Historical Monuments (unpublished document).

[13] See decision 164 EX/3.33 of the Executive Board, in *Decisions adopted by the Executive Board at its 164th session, Paris 21-30 May 2002*, available by searching the UNESCO website at http://unesdoc.unesco.org/ulis.

(b) Constitutes a breach of an international obligation of that international organization.[14]

United Nations Educational, Scientific and Cultural Organization

Paragraph 2

With reference to the possibility that the responsibility of international organizations be entailed by a failure to act, UNESCO shares the view expressed by the International Monetary Fund (see A/CN.4/545, p. 13) as to the necessity to take into account the fact that omissions may simply result from the application of the decision-making process provided under the constitutive act of the international organization concerned. For instance, when unanimity is required for a decision of a governing body of the organization, one could ask whether the fact that a member State has lawfully exercised its right of veto, thereby preventing the organization from taking action, would be of any relevance in order to exclude or limit the responsibility of that organization for an omission linked to a situation of political impasse.

The Special Rapporteur tried to reply to the argument raised by the International Monetary Fund by observing that difficulties with compliance due to political decision-making process may also arise within States and with respect to obligations to take positive actions. In this connection, the Special Rapporteur mentioned the failure by the United Nations to prevent genocide in Rwanda (see A/CN.4/553, paras. 8-10). However, one could ask whether a situation in which the Security Council failed to find an agreement between its members for taking any necessary action in order to prevent a genocide could be comparable to the situation where a decision not to intervene was taken by the Secretary-General as the highest authority in the chain of command during a military operation of United Nations peacekeeping forces when massive genocidal acts were taking place: would the United Nations be considered responsible for omission in both cases to the same extent?

UNESCO is of the opinion that the consequences of the application of the principle set forth in draft article 3 (2) to international organizations should be further explored especially with respect to the type of organ (be it collective or individual, with a political or an administrative nature) responsible for the decision not to act. The fact that the social basis of an international organization is constituted by States, i.e. other subjects of international law, should be taken into account.

E. Draft article 4 — General rule on attribution of conduct to an international organization

6. Draft article 4, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

[14] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

Article 4
General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[15]

International Labour Organization

Paragraph 2

The definition of the term "agent" in draft article 4, paragraph 2, "includes officials and other persons or entities through whom the organization acts". Given the general importance of the definition and its implications for the following provisions,[16] ILO has concerns over its wide scope.[17] The commentary to the provision explains, in particular, that the legal nature of the "agent" is "not decisive for the purpose of attribution of conduct".[18] The term could apparently also include entities "external" to an organization, such as private companies.[19] With reference to the comments received from other international organizations (see A/CN.4/565, pp. 6 and 26) it seems similarly difficult for ILO to foresee a situation where the acts of such an entity could be attributable to ILO. It would therefore be welcome if the Commission provided such examples.

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[15] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

[16] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72, commentary to draft article 4, para. (14).

[17] Article 4 of the articles on State responsibility, containing the basic rule of attribution of acts of State organs to the State, is limited to "any person or entity which has that status [of an organ] in accordance with the internal law of the State", i.e. any natural or legal person, such as an official, commission, department or other body exercising public authority (see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 4, para. (2)). The question of attribution of acts of "external" entities is covered in articles 5 ("Conduct of persons or entities exercising elements of governmental authority") and 8 ("Conduct directed or controlled by a State") which, in the draft articles on the responsibility of international organizations, have been "merged" in the basic provision on attribution rendering it very large in scope.

[18] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72, commentary to draft article 4, para. (6).

[19] Ibid., paras. (12) and (13).

Paragraph 3

The question of the definition of the term "agent" seems all the more important in the light of draft article 4, paragraph 3, according to which "[r]ules of the organization shall apply to the determination of the functions of its organs and agents". While ILO welcomes the reference to the rules of the organization, the commentary explains that the wording "is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization".[20] It remains unclear what such "exceptional circumstances" could be and what would be the bases of entrusting functions in such situations. In the view of ILO, if not based on the rules of the organizations, the conduct of a person or entity could be attributable to an organization only if acting on its instructions, or under its direction or control.[21]

United Nations Educational, Scientific and Cultural Organization

Paragraphs 2 and 3

The definition of the term "agent" in draft article 4, paragraph 2, raises particular concerns for UNESCO, as it would be applicable not only to UNESCO officials and experts on mission, but more in general to "other persons or entities through whom the organization acts".

Apparently, the existence of a functional link between the organization and its agent as a necessary condition in order to attribute his/her conduct to the organization is implied in the reference, in draft article 4, paragraph 1, to the fact that the organ or agent acts "in the performance of functions of that organ or agent"[22] . Under draft article 4, paragraph 3, the rules of the organization are indicated as being in principle the parameter to determine these functions. However, the reference to the functional link is not sufficiently developed to clearly delimit the category of "agents".

In this connection, UNESCO would like to mention the existence of a clause included in the contracts between the organization and its private contractors, which reads as follows:

> Neither the contractor, nor anyone whom the contractor employs to carry out the work is to be considered as an agent or member of the staff of UNESCO and, except as otherwise provided herein, they shall not be entitled to any privileges, immunities, compensation or reimbursements, nor are they authorized to commit UNESCO to any expenditure or other obligations.

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[20] Ibid., para. (9).

[21] Cf. Article 8 of the articles on State responsibility ("Conduct directed or controlled by a State") which contains the basic principle of attribution in international law, i.e. that acts are attributable only if "the person or group of persons is in fact acting on the instruction of, or under the direction or control of, the State" (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76).

[22] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72, commentary to draft article 4, para. (7).

UNESCO contractors may perform very different types of operational activities (including technical assistance) under fee contracts[23] and consultant contracts.[24] Although the same types of activity could be carried out by UNESCO officials, in the case of contractors UNESCO is of the view that acts performed by the latter may not be considered as acts of the organization, since the rules of the organization clearly exclude this possibility. Furthermore, the contracts in question only impose on contractors an obligation of result (for instance, the execution of a project in the field), while the organization has no direction or control over their actions nor may it exercise disciplinary powers on them.

However, in its commentary to draft article 4, paragraph 3, the Commission refers to the possibility that "in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization".[25] When these exceptional circumstances would arise is not clearly explained. The commentary to article 4 appears to suggest that such a circumstance would occur with respect to the so-called de facto organs, i.e. persons or groups of persons acting in fact on the instructions, or under the direction or control of an organization,[26] but beyond the latter case we cannot imagine other cases in which the attribution of a conduct to an organization would not be based on its internal rules and regulations. In this regard, we invite the Commission to shed further light on the type of situations that would be practically envisaged. In the opinion of UNESCO, besides acts of officials or experts on mission performed in their official capacity, only the acts of persons or entities operating in fact on the instructions, or under the direction or control of an organization, could be attributed to the latter.

The conduct of contractors may give rise to legal problems when the terms of their contract are not clear as to the real nature of the link existing between them and the organization, which may be misleading for third parties. For example, the organization once concluded a contract in which the contractor was authorized to use the name and logo of UNESCO for the organization of cultural and sports events that were supposed to be financed by the contractor himself through a fund-raising campaign not directly involving UNESCO. Although the contract clearly indicated that the activity of the contractor would by no means entail the legal or financial responsibility of the organization and contained the clause quoted in the third

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[23] A fee contract is concluded by UNESCO with an individual or legal entity having a specialized skill in order to obtain special goods or services such as the preparation or assignment of an unpublished manuscript or original work, the development of a new or improved product or process, or the provision of other services specially suited to the organization, in return for a lump sum (which includes the contractor's remuneration) and by a specified deadline. See *UNESCO Administrative Manual*, vol. I, chap. VII, item 700 (unpublished document).

[24] A consultant is a high-level specialist employed by UNESCO for a specific short period of time, for instance, to carry out a priority task in its programme of activities, undertaking on-site analysis of complex problems and the search for innovative solutions in a field where the specialists required are not available in the secretariat; to attend a conference or meeting organized by the unit concerned as a technical adviser; to provide specialized tuition in a seminar or training course organized by the unit concerned; or to carry out a short mission in a Member State, thereafter drawing up a report to advise the Government or a national institution on a matter related to the programme of activities of the unit concerned (Ibid., vol. II, chap. 24, item 2435).

[25] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72, commentary to draft article 4, para. (9).

[26] Ibid., para. (13).

paragraph of the present set of comments, UNESCO was held partially liable, in an arbitral award, towards the contractor, who had to face relevant financial liabilities towards his creditors, for not fulfilling its obligation to cooperate with him, but also for having created "an evident risk of ambiguity for third parties" by authorizing the contractor to use its name and emblem. In this case, the contractor was not considered a UNESCO agent, but the organization was considered as bearing part of the responsibility, inter alia, for having created an ambiguity about his real status.[27]

Except for the case just mentioned, the clause mentioned above seems to protect UNESCO in an effective manner from claims that might arise from the conduct of its contractors. We are not aware of any specific cases in which the organization has been held directly or indirectly liable for actions performed by its contractors.

Draft article 4, paragraph 2, in connection with draft article 5

With reference to the "entities" through which an organization may act, UNESCO notes that the content of this notion is not sufficiently clarified in the commentaries to draft articles 4 and 5. UNESCO wonders whether the wide definition of "agents" included in draft article 4, paragraph 2, without any further qualifications, might leave the door open for the attribution to an organization of acts performed by State entities or private entities (such as universities, research institutes, etc.) that happen to be its "contractors". UNESCO agrees with the view expressed in the commentary to article 4, according to which the reference to the "conduct of persons or entities exercising elements of governmental authorities" used in article 5 of the draft articles on the responsibility of States for internationally wrongful acts would not be appropriate for international organizations;[28] however, in our view, further elaboration is needed on this point so as to better define the link that must exist between these entities and the organization concerned.

Within the UNESCO legal framework, reference may be made in this connection to National Commissions, which are not part of UNESCO, but are referred to in the UNESCO Constitution.[29] They may be either governmental agencies, i.e. State organs (usually a department or unit within the competent ministry of a member State), but also non-governmental organizations. Under specific arrangements made in accordance with the Charter of National Commissions for UNESCO, these entities may be entrusted with specific tasks by

[27] A copy of the arbitral award was attached to the UNESCO submission (see sect. III of the present report).

[28] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72, commentary to draft article 4, para. (12).

[29] Article VII of the Constitution states: "National Commissions or National Cooperating Bodies, where they exist, shall act in an advisory capacity to their respective delegations to the General Conference, to the representatives and alternates of their countries on the Executive Board and to their Governments in matters relating to the Organization and shall function as agencies of liaison in all matters of interest to it." See *Basic Texts*, UNESCO Publishing, Paris, 2004, in printed form or on the UNESCO website at http://unesdoc.unesco.org/images/0013/001337/133729e.pdf .

organs of the organization.[30] The activities that can be subcontracted to these entities are very different in nature, however, unless a specific arrangement is made to this end, UNESCO never retains effective control over their conduct, since they are entities clearly separate from the organization. Since draft article 5 only refers to organs or agents "placed at the disposal of an international organization by a State or another international organization", the provision would appear not to be suitable for the case of National Commissions for UNESCO, especially when the agent placed at the disposal of UNESCO comes from non-governmental organizations. Nevertheless, National Commissions could fall within the wide definition of "agents" provided under draft article 4, paragraph 2, in which the requisite of effective control is not expressly set forth.

A clearer definition of the link between organizations and external entities which could possibly be considered as acting on behalf of the organization would be welcome, as UNESCO is particularly exposed to the risk of facing liability claims for the acts of legally separate entities which, also for historical reasons, have developed close relations with the organization. For instance, there exist a number of institutes and centres, referred to as "category 2 institutes and centres", which are nationally based institutions or intergovernmental organizations placed "under the auspices" of UNESCO. They are entities which are not legally part of the organization, but which are associated with it through formal arrangements approved by the General Conference and may contribute to the execution of the UNESCO programme.[31] Reference may also be made to the UNESCO clubs and associations, which were created all over the world at the end of the Second World War to publicize the work of the organization. They are private associations established under the domestic legislation of member States and UNESCO has no direct control over them. However, both category 2 institutes and centres and UNESCO clubs are authorized to use the name and logo of the organization in their promotional activities.

UNESCO is of the opinion that only acts of officials or experts on mission performed in their official capacity and acts of entities which are considered as being an integral part of the organization could be attributable to the organization. In all cases concerning contractors, be they private individuals, public or private legal entities or National Commissions, their actions cannot be attributed to UNESCO and may not entail its responsibility, unless specific arrangements have

[30] Under article II.2 of the Charter of National Commissions for UNESCO adopted by the UNESCO General Conference, "Depending on the arrangements made by each Member State, National Commissions may also be expected, inter alia: to assume, alone or in collaboration with other bodies, responsibility for the operation of UNESCO projects in the country and for national participation in subregional, regional, or international UNESCO activities". Article III.4 of the aforesaid Charter provides that National Commissions "must be able to contribute effectively to the implementation of UNESCO's programme: [...] (b) By assuming operational responsibility for some of UNESCO's programme activities". According to Article V.3, "UNESCO can extend and develop its action through National Commissions by: (a) Entering into contracts with them, wherever necessary, for the execution of activities included in its programme; [...]" (Ibid., pp. 145-151).

[31] See UNESCO document 33 C/19, *Principles and guidelines for the establishment and functioning of UNESCO institutes and centres (category 1) and institutes and centres under the auspices of UNESCO (category 2)*, General Conference, 33rd session, Paris 2005, in printed form or on the UNESCO website at http://unesdoc.unesco.org/images/0014/001403/140303e.pdf.

been made to place them under the control of the organization or unless the organization has subsequently ratified their actions.

Paragraph 4

UNESCO supports the inclusion of a reference to the rules of the organization in draft article 4, paragraph 4, concerning the general rule on the attribution of conduct. UNESCO considers the definition included in draft article 4, paragraph 4, as being adequate and approves the decision to enlarge the definition set forth in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (article 2, paragraph 1 (j)) to cover, together with "decisions" and "resolutions", "other acts taken by the organization". Within UNESCO there exists a body of detailed administrative regulations which govern the functioning of the organization and contain indications on the scope of the competences and functions of its organs.

F. Draft article 5 — Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

7. Draft article 5, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

> **Article 5**
> **Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization**
>
> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[32]

International Labour Organization

As the Special Rapporteur affirmed in his second report, "[m]ost of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal relates to peacekeeping forces" (A/CN.4/541, para. 34). ILO notes that there is, however, a widespread practice whereby member States or other international organizations put their own officials at the disposal of an international organization such as ILO. This practice has already been mentioned in the comments provided by Interpol (see A/CN.4/556, pp. 24-25).

The legal framework within which officials are put at the disposal of ILO may result in two different situations. The first is that the national official or the official of another international organization becomes an official of ILO. In such a case, ILO becomes responsible for the conduct of the official, as he or she becomes its agent.

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[32] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 71.

The second situation arises when the official concerned is kept under employment contract with the releasing State or international organization. This form of secondment (also known as "loan" in the terminology of the United Nations common system) is based on an agreement between the State concerned and the international organization or between two organizations. The issue of effective control over the official's conduct is not so obvious. The statutory position of the official is determined by his or her terms of appointment with the releasing organization or State and that releasing organization or State remains responsible for all expenditures in connection with the assignment of the official, such as remuneration, leave, allowances, health care, pension, occupational accident or sickness. The releasing State or international organization typically retains its competence regarding disciplinary measures.

The official is, however, under the administrative supervision of an ILO official and benefits from the same facilities as the regular ILO staff regarding office space, computers and other facilities necessary to carry out his or her assignment in ILO. The official has a duty to respect standards of conduct and other rules applicable to ILO officials only to the extent specified in the agreement between the releasing organization or State and ILO.

In the light of the above, ILO would welcome further clarification of the expression "effective control" in the context of draft article 5.

G. Draft article 6 — Excess of authority or contravention of instructions

8. Draft article 6, as provisionally adopted by the Commission at its fifty-sixth session, reads as follows:

> **Article 6**
> **Excess of authority or contravention of instructions**
>
> The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.[33]

International Labour Organization

ILO agrees with the principle that an international organization may be held responsible for *ultra vires* conduct of its organs or officials, when such conduct exceeds the powers of a specific organ or official under the rules of the organization or, *a fortiori*, when the conduct goes beyond the powers conferred on the organization by its constituent instrument. However, there is a distinction to be made between those two situations. Where the conduct exceeds the power of an organ or official but remains within the powers of the organization, the situation is the same as for *ultra vires* conduct of organs of a State: third parties need protection as they cannot be expected to have knowledge of the internal legal rules of the State or organization, which define the powers of the organ or official concerned. The situation is different where the conduct is *ultra vires* for the international

[33] Ibid.

organization, a case that is not conceivable for States due to their general competence. As in such cases third parties appear to require less protection, the introduction into the article of exceptions from the responsibility of the organization such as those suggested by Interpol and the International Monetary Fund (see A/CN.4/556, pp. 26-27) would seem appropriate.

Concerning the condition under which an *ultra vires* act of the organization requires that the concerned organ or official act in its official capacity, the Special Rapporteur noted that the wording "in that capacity" is "rather cryptic and vague" (see A/CN.4/541, para. 57). While there certainly is a need in practice to establish more detailed criteria, it may be noted that in another context, that of applying privileges and immunities, international organizations already have a long and abundant practice in determining whether or not officials have acted in their official capacity, given that jurisdictional immunity is normally granted to officials only in respect of acts performed in that capacity.

H. Draft article 8 — Existence of a breach of an international obligation

9. Draft article 8, as provisionally adopted by the Commission at its fifty-seventh session, reads as follows:

Article 8
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.[34]

European Commission

Articles 8 (1), 9, 10 and 11 of the present draft are identical to articles 12 (1), 13, 14 and 15 on State responsibility. There is indeed no need to deviate from the rules for States in this respect and hence we have no remarks.

Article 8 (2) on non-compliance with an "obligation under international law established by a rule of the international organization", however, raises some questions. The rule does not give any guidance as to which sorts of rules of the international organization qualify as "obligations under international law". Certainly, in the case of the European Community, the important question would arise whether a violation of secondary Community law by a Community institution triggers the international responsibility of the European Community. Given that the European Court of Justice has characterized the European Community ever since the 1960s as a legal order of its own, the prevailing view inside the Community would be that it does not. (And the same would be true, in our view, of the breach of secondary Community law by a member State.) The commentary may be of some help in this respect, because it states that the article does not intend to take a

[34] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

position in the debate between those who regard the "internal" law of international organizations as partly or wholly autonomous in relation to international law and those who regard it as an integral part of international law. Nevertheless, it remains an open question whether article 8 (2) is an essential part of the draft articles.

International Labour Organization

Paragraph 2 of draft article 8 provides that "paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization". By leaving open the controversial question of the legal nature of the rules of international organizations, this provision does not seem to afford the necessary legal security to international organizations. On the other hand, the legal nature of those rules may not be determining, provided that organizations are able to rely on two provisos that would significantly limit the scope of a possible international responsibility for non-compliance with a rule of the international organization.

The first proviso would be a full application of the principle of *lex specialis derogat legi generali*. In its commentary to draft article 8, the Commission points to the fact that "rules of an organization may devise specific treatment of breaches of obligations, also with regard to the question of the existence of a breach".[35] While the Commission puts forward two examples where the special rules would not necessarily prevail over principles set out in the draft articles, ILO considers that the vast majority of possible breaches of its internal rules, including in particular of its various administrative regulations and rules, would not entail an international responsibility of the organization under the draft articles, since the relevant obligations are created, fulfilled and sometimes enforced exclusively within the special internal legal order of the organization, of which they form part. In this regard, the ILO staff regulations constitute the most undisputable example. Because those regulations are adopted by the Governing Body of ILO to govern the relationship between the organization and its officials and that responsibility under those rules can be enforced through the Administrative Tribunal of ILO, there would remain no room for international responsibility under the *lex generalis* codified in the draft articles.

The second proviso would be that the distinct legal personality of an international organization is fully taken into account when determining whether a State is entitled to invoke the responsibility of that organization in case of a breach of the rules of the organization. For example, if the secretariat of an international organization were to cause a financial loss to the organization owing to non-compliance with the organization's financial regulations (e.g. regarding investment of funds or procurement), it should be recognized that the obligations breached are owed to the organization itself and not to the member States that contribute to the organization's budget. The legal personality of international organizations constitutes an effective "veil" in two directions: not only does it shield member States from being held responsible by third parties for their conduct within the international organization (on this point, see comments in section K below on the specific questions asked by the International Law Commission), it also, conversely, prevents member States from invoking obligations that are in reality owed to the organization as a distinct subject of international law. In ILO practice, cases such as

[35] Ibid., para. 206, commentary to draft article 8, para (7).

the above example would presumably be reported by the external auditor to the Governing Body and the Director-General would assume the political responsibility for the loss while, in turn, applying internal sanctions against the directly responsible officials.

Provided that the Commission will take into account the above two provisos when examining the question concerning *lex specialis* and the invocation of the responsibility of an international organization,[36] the uncertainties created by the wording of draft article 8, paragraph 2 would seem to be acceptable.

United Nations Educational, Scientific and Cultural Organization

Concerning the controversial legal nature of the rules of the organization in relation to international law, we note that in the formulation of article 8, paragraph 2, on the existence of a breach of an international obligation, the Commission has chosen to leave the door open to the possibility of applying the principles established under the present draft articles to breaches of obligations arising from the rules of the organization. On this point, UNESCO shares the opinion expressed by other organizations that breaches of such obligations should be considered as a special regime and therefore excluded from the scope of the study.

As far as the employment relationship between an organization and its staff is concerned, the responsibility of the organization for breaches of internal rules is established within its internal legal order, under which appropriate legal remedies are in principle provided. This should be considered a "self-contained regime". In the case of UNESCO, the ILO Administrative Tribunal, which is competent to examine complaints concerning violations of UNESCO staff regulations and rules by the organization, is in a position to ensure the protection of UNESCO employees' fundamental rights, should the organization have violated them either by disregarding the staff regulations or by adopting staff regulations that are inconsistent with the general principles of international civil service law (concerning for example staff associations' collective rights).

As regards the breach of obligations of an international organization toward its member States arising from its internal rules, the internal legal order of the organization generally provides a system of checks and balances between organs that should sufficiently protect the rights of member States established under the constituent treaty. In case a member State were of the opinion that the organization had violated those rights, it could have recourse to the dispute settlement remedies provided under the constituent treaty.[37]

In the light of the above, UNESCO considers draft article 8, paragraph 2, to be a mere tautology, as it simply affirms that the principles established under the draft articles would also apply to breaches of internal rules of the organization to the extent that they set out obligations under international law. The fact of admitting this possibility gives no clear indication about the scope of the present study and

[36] The corresponding provisions of the articles on State responsibility are article 55 and article 42, respectively.

[37] See article XIV.2 of the UNESCO Constitution, under which "any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure".

international organizations cannot accept such a degree of uncertainty on this fundamental issue.

I. Draft article 15 — Decisions, recommendations and authorizations addressed to member States and international organizations

10. Draft article 15, as provisionally adopted by the Commission at its fifty-seventh session, reads as follows:

> **Article 15**
> **Decisions, recommendations and authorizations addressed to member States and international organizations**
>
> 1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.
>
> 2. An international organization incurs international responsibility if:
>
> (*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and
>
> (*b*) That State or international organization commits the act in question in reliance on that authorization or recommendation.
>
> 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.[38]

European Commission

We note with interest how the International Law Commission approached the issue of "normative control" of decisions, recommendations and authorizations of international organizations in draft article 15. We agree with the Chairman of the Drafting Committee that there are no clear practical examples to assist in formulating this particular provision. We would therefore suggest that the International Law Commission employ great care in its future discussion.

We welcome the fact that article 15 distinguishes between binding decisions of an international organization (paragraph 1) and mere authorizations or recommendations (paragraph 2). The underlying idea is that an international organization should not be liable for acts of its member States, if the latter was not required by the organization to take a certain action, but decided to do so of their own volition, independently of the authorization or recommendation from the international organization.

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[38] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 05.

Nevertheless, the distinction may not be refined enough. To give a Community law example, under article 249 of the Treaty establishing the European Community, secondary Community law may be binding in its entirety and directly applicable in all member States (regulations), or only binding as to the result to be achieved (directives), or binding only upon those to whom it is addressed (decisions). It is suggested that an obligation of result (as in a Community directive) comes very close to a binding decision, but nevertheless may leave a certain amount of discretion to the member States of an organization. Therefore, paragraphs 1 and 2 of draft article 15 may well be in need of some refinement on this point.

Coming back to paragraph 1 of article 15, here the mandatory requirements for member States to commit an internationally wrongful act imposed by an international organization must also "circumvent" an international obligation of the international organization. However, we wonder whether the notion of circumvention is indispensable in the light of the Commission's own commentary on article 15. If — as the Commentary puts it — compliance by members with a binding decision is to be expected,[39] the whole notion of circumvention may become superfluous. In the final part of paragraph 1 of article 15, "circumvent" could then better be read as "breach". On the other hand, if one takes the view that the idea of mandatory "law on the books" constituting a breach of international law is restricted to the limited domain of World Trade Organization law only and has not taken hold in general international law, or depends in any case on what the law actually states, then the notion of circumvention does not have a function in paragraph 1. It would seem commendable that the Commission revisits this article and the comments pertaining to it at a later state in order to create greater clarity on this issue.

International Labour Organization

It is noteworthy that, under paragraph 1 of draft article 15, an international organization incurs international responsibility by the mere fact of adopting a decision binding on a member State or international organization to commit an act of the wrongful nature described, without the act actually being taken on the part of the member State. Under this formulation, the very fact of creating an inconsistent international obligation, without more, would seem insufficient, especially if the member State were to invoke the wrongfulness in defence of its failure to comply. One of the two conditions for an internationally wrongful act of an international organization to arise is that the relevant conduct "constitutes a breach of an international obligation of that organization". ILO wonders whether the mere fact of adopting the binding decision referred to above, without the act being actually committed by the State, could constitute a breach of an international obligation of the concerned organization. In contrast, the commission of an act in reliance upon an authorization or recommendation to do so in paragraph 2 of draft article 15, while appearing reasonable, would seem to contradict the premise under which the single prong for wrongfulness is established in paragraph 1.

[39] Ibid., para. 206, commentary to article 15, para (5).

United Nations Educational, Scientific and Cultural Organization

From a general point of view, UNESCO is in agreement with the structure and formulation chosen for this draft article. However, further elaboration on the possible cases that would fall under this clause would be welcome.

In particular, UNESCO is of the opinion that the scope of draft article 15, paragraph 2, should be further elucidated possibly in the commentary to the same provision, namely with reference to the expression "an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization": should the committed internationally wrongful act and the circumvention necessarily refer to the same international obligation?

J. Circumstances precluding wrongfulness — general considerations

International Labour Organization

Without prejudice to possible comments by ILO on the forthcoming work of the Commission concerning circumstances precluding wrongfulness, ILO considers that international organizations may invoke such circumstances, as recognized under general international law. ILO notes that the particular nature of international organizations should be adequately taken into consideration in the codification of those rules.

In response to the question whether the plea of necessity could be invoked by an international organization under a set of circumstances similar to those enumerated in article 25 of the articles on the responsibility of States for internationally wrongful acts, ILO is not aware of any relevant practice in that regard. ILO agrees that the plea of necessity is limited to exceptionable situations and admitted only under strict conditions, in particular that of safeguarding "an essential interest against a grave and imminent peril".[40] In light of the diverse mandates and functions of international organizations as well as the wide range of "essential interests" invoked in State practice to justify the plea,[41] the ILO considers that international organizations should not be excluded from invoking the plea. ILO would welcome the Commission studying whether the "essential interests" of international organizations enshrined in their constitutive instruments could be invoked in this context.[42]

United Nations Educational, Scientific and Cultural Organization

As concerns the applicability to international organizations of the draft articles on State responsibility concerning the circumstances precluding wrongfulness, those provisions may in principle be transposed to the present study.

While draft articles on consent, self-defence, distress and force majeure do not seem to raise particular problems, the applicability mutatis mutandis of the provisions on countermeasures and necessity looks more problematic.

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[40] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports*, 1997, p. 40, para. 51.

[41] J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), p. 183.

[42] Cf. response of the European Commission in A/CN.4/556, p. 40.

With reference to countermeasures, UNESCO is of the opinion that, should the issue of countermeasures be addressed in the draft, it should be clearly distinguished from that of sanctions, which may be adopted by an organization against its own member States.

With regard to necessity, UNESCO shares the position taken by the Special Rapporteur in his fourth report (A/CN.4/564, sect. II. G), according to which a reference to the constituent instrument would be too restrictive in order to define the "essential interest" that an organization may need to safeguard against a grave and imminent peril. UNESCO believes that the reference to the "functions" of the organization, included in the proposed draft article 22, would more appropriately delimit the scope of the provision.

K. Responsibility of States for the internationally wrongful acts of international organizations

European Commission

With reference to the questions raised in paragraph 26 of the Commission's 2005 report (see para. 1 above), we do not see a compelling reason why the Commission should treat these questions. The draft deals with the international responsibility of an international organization. As draft article 16 already indicates, it is without prejudice to the international responsibility of States, including the member States of the international organization in question. The existing rules on State responsibility may well be applied by analogy when a State does not aid or assist another State but an international organization to commit an internationally wrongful act.

On the other hand, in our practice we have faced claims, according to which the Community was said to be liable for aiding or assisting third States in the commission of internationally wrongful acts, thereby allegedly triggering the international responsibility of the Community itself. A pertinent example is a case that was brought in a court of a third State against the Community for allegedly having financed illegal activities of a public body, the employees of which allegedly caused the death of members of the applicant's family. In such a situation, it would be important to apply a similarly high threshold for triggering international liability as is laid down for assistance or aid by States under article 16 of the rules on State responsibility. Accordingly, assistance or aid for an internationally wrongful act could only trigger the international responsibility of an international organization if:

(a) The international organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by the international organization.

International Labour Organization

Question (a)

The basic position of ILO on question (a) is that articles 16 to 18 of the articles on the responsibility of States cannot be transposed into the draft articles on the responsibility of international organizations, unless their scope is clarified to the

effect that they apply only to the responsibility of member States incurred when acting outside the constitutional framework of the organization.

If transposed to the responsibility of international organizations, articles 16 to 18 would require collaboration or other interaction between a State and the international organization in the commission of an internationally wrongful act of the organization. In this regard, there is a fundamental distinction to be made between the two different levels on which an international organization can interact with a member State. On the one hand, a member State can act within the constitutional framework and procedures of the organization. As a member of the organs of the organization, it contributes to the taking of collective decisions, including on the adoption (or non-adoption) of legal instruments of the organization. It also fulfils its basic obligations as a member under the constituent treaty, such as the payment of its assessed contributions. On the other hand, a member State may interact with an international organization beyond the scope of its constitutional obligations as a member of the organization; in such cases, the State and the organization relate to each other as two independent subjects of international law whose relationship would be governed by, inter alia, any relevant rules of international law applicable to their relations. This is the case, for example, when a State provides funds to the organization for its extrabudgetary technical cooperation activities or accepts such activities as a beneficiary, or when it offers to host its headquarters, offices or meetings and grants privileges and immunities to the organization.

It has been suggested in the Commission's commentary on article 57 of the articles on State responsibility[43] that a State may incur international responsibility by virtue of its membership in an international organization. This would seem to imply that member States acting within the constitutional framework of an organization could be held responsible for the consequences of internationally wrongful acts committed by that organization. If articles 16 to 18 of the articles on the responsibility of States were to be reproduced mutatis mutandis in the draft articles on the responsibility of international organizations, this would indeed be a possible consequence. In the view of ILO, such consequence would however not reflect applicable custom and practice.

As was properly stated in a 1995 resolution of the Institute of International Law, there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily for the obligations of an international organization of which they are members.[44] In the absence of provisions to the contrary in constituent instruments of the concerned organization or otherwise failing the consent of the concerned member States, the latter are shielded by the organization's own and distinct legal personality. While constituent instruments of certain international organizations do make provision for the shared responsibility between an international organization and its member States,[45] this is not the case of the majority of them, including the Constitution of ILO, and there is

[43] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

[44] Article 6 of resolution II adopted by the Institute of International Law at its 1995 session, available through the website www.idi-ili.org.

[45] See, for example, the Convention on International Liability for Damage Caused by Space Objects (1972), providing a system for sharing of liability between the organization and member States for damage caused by activities under the Moon Treaty and the Outer Space Treaty.

no practice to show the existence of such concurrent or subsidiary responsibility. While there is an opinion in academic writing contending that in certain cases member States could be held responsible for internationally wrongful acts of an international organization, it would seem that those are mainly based on the *International Tin Council* and the *Westland Helicopter* cases, whose scope and relevance seem to have been overestimated.[46] Without further entering into the general debate on this issue, ILO wishes to state that it does not consider those cases as precedents that would apply to the international responsibility of organizations such as ILO whose mandate does not entail major economic operations under national laws.

A hypothetical transposition of articles 16 to 18 of the articles on State responsibility into the responsibility of international organizations would in particular seem to cover situations where member States have contributed to an internationally wrongful act of an international organization through their participation in the organization's decision that is at the origin of the wrongful act (which may be an action or omission) by voting for or against it, by abstaining, or permitting or impeding consensus in the competent collective decision-making body. In this regard, in addition to the more general considerations raised in the preceding paragraph, there is a specific reason why ILO needs to rely on the "veil" of its international legal personality. All governing organs of ILO have a tripartite membership, which means that, in addition to Government representatives, non-governmental members, i.e. employers' and workers' representatives, participate in the work and the decisions of those organs on an equal footing with Governments. In particular, the Governing Body of the International Labour Office, which is the pivotal organ of the International Labour Organization, entrusted with important decision-making powers, is one-half composed of employer and worker members, who participate in the decisions of the Governing Body with an equal voting power. As they are elected by the International Labour Conference in their personal capacity, they cannot be considered to be the agents of any member Government, nor even of their respective employers' or workers' organizations.[47]

If member Governments could be held concurrently responsible for internationally wrongful acts of ILO resulting from Governing Body decisions, whereas employer and worker members of the Governing Body could arguably not, this would create a distortion incompatible with the structural principles inherent to the Constitution of ILO. The suggestion made by Interpol that draft article 1 (2) could also cover the responsibility of non-State entities (see A/CN.4/556, p. 11) would help only to the extent that it also covered individual members of the organs of the organization, which are not themselves members of the organization. However, ILO would in any event not be favourable to any such extension of the scope of the draft articles, as there seems to be no practice in this regard.

In view of the above, ILO would suggest that the scope of articles 16 to 18, if transposed into the draft articles on responsibility of international organizations, be limited so as to exclude the concurrent or subsidiary responsibility of a member State acting exclusively within the constitutional framework and procedures of an organization except as the organization and its member States may expressly agree

[46] See, for example, P. Klein, *La responsabilité internationale des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant, Brussels, 1998), pp. 430-438.

[47] See Constitution of ILO, article 7.

otherwise. This would, however, be without prejudice to that State's own responsibility under the articles on State responsibility in case of breach of the organization's constituent instrument.

Provided that their scope were limited as described above, ILO would be favourable to transposing at least articles 16 into these draft articles and would not object to the same as regards articles 17 and 18, although it is not aware of any practice regarding the latter two. As a general comment, it may be noted that the responsibility under those adapted articles would not need to be limited to States that are members of the concerned international organization, since some of the acts that would qualify as aid, assistance, direction, control or coercion under those articles could as well be committed by non-member States.

As regards article 16, its application mutatis mutandis to the case of a State which aids or assists an international organization in the commission of an internationally wrongful act by the latter would seem to be justified. Such aid or assistance takes, for example, the form of providing funds to the organization for its extrabudgetary technical cooperation activities or hosting its headquarters, offices or meetings. The existence of concurrent responsibility of a State in those cases is confirmed in practice by the fact that States sometimes exclude that responsibility by way of agreement. For example, donor Governments of ILO sometimes exclude their responsibility for possible damages caused by activities of ILO under the financed projects.[48] ILO, in turn, regularly passes the primary responsibility for third-party claims in connection with those activities on to the Government of the beneficiary country.[49] Similarly, the headquarters agreement between ILO and Switzerland provides that "Switzerland shall not incur by reason of the activity of the International Labour Organisation on its territory any international responsibility for acts or omissions of the Organisation or of its agents acting or abstaining from acting within the limits of their functions".[50]

Concerning article 17 of the articles on State responsibility, it is noted that the examples mentioned in the Commission's commentary to that article for direction of or control over a State by another State do not fit for international organizations. In fact, it is not clear how a State could assume the direction or control of an international organization from outside of its constitutional framework. In any event, any attempt to do so would constitute a breach of the principle of independence of the international organization and of the provisions of its constituent instrument that safeguard the independence of its executive head and other staff, which would entail the responsibility of the State itself. Assuming,

[48] E.g. grant agreements with one donor Government agency contain the following clause:

> [Donor] does not assume liability for any third-party claims for damages arising out of this grant.

[49] The ILO standard agreement with beneficiary Governments includes a clause similar to that usually contained in the UNDP standard basic assistance agreements, reading as follows:

> The Designated Institution shall handle and be responsible for any third-party claim or dispute arising from operations under this Agreement against the ILO, its officials or other persons performing services on its behalf, and shall hold them harmless in respect of such claims or disputes. Where a claim or dispute arises from the gross negligence or wilful misconduct of the above-mentioned individuals, the Parties shall consult with a view to finding a satisfactory solution.

[50] Agreement between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland, art. 24 (available at www.ilo.org/public/english/bureau/leg/agreements/switz.htm).

however, that a State could establish a de facto direction or control over the organization, the provisions of article 17 would seem to provide an appropriate answer to the question of concurrent responsibility of the State.

Similarly, as regards article 18, ILO is not aware of any practice of a State coercing an international organization, but would consider that those provisions would be transferable to such hypothetical situations.

Question (b)

Apart from the cases considered above, ILO on the basis of its practice does not consider that there may be other cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member.

United Nations Educational, Scientific and Cultural Organization

In considering the issue referred to in question (a), the Commission should keep in mind that the international organizations to which the present draft principles would apply do have an international legal personality and, therefore, they are subjects which are in principle autonomous from their member States. Given this premise, it must be made clear that all actions taken by member States within the context of the constitutional framework of the organization (in terms of their contribution to their organization's decisions to act or not to act) would not entail their responsibility, unless a specific provision to this end is provided under its constitutive treaty. The responsibility of member States could be affirmed only when those States could be said to retain full control over the actions of the organization so that its legal personality would be considered a mere fiction.

In the light of the above, the aforesaid provision referring to the case of a State aiding or assisting an international organization in the commission of an internationally wrongful act should be limited, on the one hand, to the relations between the organization and non-member States and, on the other hand, as far as relations with member States are concerned, to those cases in which the organization and the member State concerned interact as independent subjects of international law. This would be the case when military forces of a member State collaborate with forces under the command of an organization in order to illegally overthrow a foreign Government or when a member State receives technical assistance from an organization and State agents collaborate with the organization's staff in carrying out internationally wrongful acts such as an illicit traffic of cultural objects.

In this regard, it is worth mentioning that in case of technical assistance activities, specific arrangements are made between the organization and the beneficiary State so as to exclude the responsibility of the former for claims or liabilities resulting from the activities performed by the organization's personnel in the country. The standard agreements on technical assistance between UNESCO and beneficiary countries include the following standard clause, which reflects an established practice followed for this type of agreement by the specialized agencies of the United Nations system:

> The Government shall be responsible for dealing with any claims which may be brought by third parties against UNESCO, its property and its personnel or other persons performing services on behalf of UNESCO and shall hold

> harmless UNESCO, its property, personnel and such persons in case of any claims or liabilities resulting from activities under this Plan of Operation, except where it is agreed by UNESCO and the Government that such claims or liabilities arise from the gross negligence or wilful misconduct of such personnel or persons.

Also, in those cases where a member State is willing to donate funds to the organization for technical assistance activities to be carried out in the territory of another Member State, the donor Government often asks for the inclusion in the agreement with UNESCO of the following non-liability clause:

> [Member State X] does not assume liability for any third-party claims for damages arising out of this grant.

As for the situations in which a State would direct and control an international organization in the commission of an internationally wrongful act or exercise coercion on the latter, the case appears to be rather unlikely. In a very hypothetical case, coercion could be exercised by a State, for instance, over the organization's secretariat following a military occupation of the territory of the State hosting the coerced organization. However, within the constitutional framework of an organization, the exercise of direction or control by a member State over the organization's action does not appear to be possible given the legal guarantees usually provided for under constituent treaties.

III. List of attachments to the comments and observations received from international organizations

United Nations Educational, Scientific and Cultural Organization

- Boulois v. UNESCO, arbitral award dated 4 May 2000[51]

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[51] On file with the Codification Division of the Office of Legal Affairs.